U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 June 2007

Case No.: 2006-LHC-1627

OWCP No: 07-175085

IN THE MATTER OF

M. S.,
Claimant

vs.

OILFIELD PRODUCTION CONTR., INC.,
Employer

and

AMERICAN INTERSTATE INSURANCE CO.,
Carrier

APPEARANCES:

DAVID HILLEREN, ESQ.,
On Behalf of the Claimant

V. WILLIAM FARRINGTON, JR., ESQ.
On Behalf of the Employer/Carrier

Before: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by Claimant against Oldfield Production Contractors (Employer) and American Interstate Insurance (Carrier).[2]

[1] 33 U.S.C. §901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 29 Jun 06. All parties were represented by counsel. On 11 Jan 07, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of

Claimant
Keith Boudreaux
Jo Ann Naquin
Claimant's Brother

Exhibits

Claimant's Exhibits (CX) 1-39[4]
Employer's Exhibits (EX) 1-27
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[5]

1. There is jurisdiction under the Act.

2. Claimant was injured on 21 Jul 04.

3. The injury occurred in the course and scope of employment.

4. An Employer/Employee relationship existed at the time of the accident.

5. Employer was properly notified of the injury.[6]

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[2] Employer and Carrier are collectively referred to as Employer for convenience.
[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] CX-17, 18, 23, and 24 appeared to be *en globo* collections of medical records. Counsel were cautioned that only those pages specifically cited to would be considered a part of the record upon which the decision would be based.
[5] JX-1.
[6] Although the parties originally agreed to appropriate and timely controversion, and that Claimant was not seeking penalties, Claimant's counsel subsequently withdrew that stipulation, with the consent of Employer.

6. At the time of injury, Claimant had an average weekly wage of $1,901.78.

7. At the time of trial, Claimant had a 6% disability in his thumb.

ISSUES[7]

1. Nature and Extent of Injury

2. Maximum Medical Improvement

3. Authorization of a Functional Capacity Evaluation

4. Section 48a Unlawful Termination

5. Penalties

FACTUAL BACKGROUND

Claimant injured his thumb while working for Employer on 21 Jul 04. Although he was unable to return to his original position, he continued to work for Employer until he was fired on 28 Apr 06. He eventually obtained a job with another employer on 16 Aug 06.

POSITIONS OF THE PARTIES

Nature and Extent

Although Claimant was injured in July 2004, he does not claim any right to disability compensation until 1 Jan 05. He only seeks temporary partial disability from 1 Jan 05 through his discharge from Employer on 28 Apr 06. He then seeks temporary total disability from the time of discharge until he started working again on 16 Aug 06. Employer disputes the method Claimant uses to calculate his temporary partial disability from 1 Jan 05 through 28 Apr 06 and argues that he is only entitled to partial, not total disability benefits from 28 Apr 06 to 16 Aug 06 because he was not terminated from Employer due to his disability.

Claimant also seeks $2,500 for an FCE which his doctor recommended and he obtained. Employer responds the FCE was not reasonable, appropriate, or necessary.

Claimant seeks penalties because Employer terminated him in violation of Section 48a. Employer responds that the termination was not related to his claim for disability, but was based on a good faith belief he violated company policy.

[7] JX-1.

Claimant argues that Employer failed to controvert the claim until 19 Jun 06 and he is entitled to penalties. Employer replies that where there is a scheduled injury with no time lost, there is no controversy to address until the Employer is aware of the permanency of condition or extent of impairment.

LAW

While the Act is construed liberally in favor of the claimant,[8] the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[9] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[10]

Maximum Medical Improvement

The traditional (albeit not exclusive) method for determining whether an injury is permanent or temporary is the date of maximum medical improvement (MMI).[11] The date of maximum medical improvement is a question of fact based upon the medical evidence of record.[12] An employee reaches maximum medical improvement when his condition becomes stabilized.[13]

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[14]

To establish a *prima facie* case of total disability, the employee need only show he cannot return to his regular or usual employment due to his work-related injury.[15] If the claimant makes this *prima facie* showing, the burden shifts to the employer to show suitable alternative employment.[16]

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[8] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[9] 5 U.S.C. § 556(d).
[10] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[11] *See Turney v. Bethlehem Steel Corp.,* 17 BRBS 232, 235 n. 5 (1985); *Trask*, 17 BRBS 56; *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989).
[12] *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).
[13] *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Ltd.*, 14 BRBS 395, 401 (1981).
[14] *Cherry v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises*, *Ltd.*, 14 BRBS 395, 401 (1981).
[15] *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984).
[16] *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

An employer can show suitable alternative employment by offering the claimant a job in its facility.[17] However, such a job must be a "substantial" one, not designed for the primary benefit of the employee. If it is, the employer has satisfied the requirement to show suitable alternative employment. If a claimant loses his suitable alternative employment because he was fired solely for violating a company rule and would otherwise still be working for the employer, his disability is partial, not total.[18]

The Act is designed to compensate for "incapacity because of injury to earn the wages which the employee was receiving at the time of injury."[19] Incapacity is the difference between the average weekly wage (AWW) and the post injury wage earning capacity.[20]

Calculation of the post injury wage earning capacity involves (1) determining whether the claimant's actual post injury wages reasonably and fairly represent his wage-earning capacity and, if not, (2) determining the dollar amount which fairly and reasonably represents the claimant's wage-earning capacity.[21] The burden of proof is on the party arguing that the claimant's actual post-injury wages do not reasonably and fairly represent his wage-earning capacity.[22]

The Act includes a schedule of defined benefits for permanent injuries to specific body parts and limits the employee to the scheduled compensation.[23] In the case of a lost thumb, it calls for the payment of 2/3 of the claimant's AWW for 75 weeks, regardless of economic factors.[24] However, if the employee is totally disabled, the schedule does not apply.[25]

Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.[26]

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[17] *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.2d 685 (5th Cir. 1996); *Darden v. Newport News Shipbuilding*, 18 BRBS 224 (1986).
[18] *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19 BRBS 171 (1986); *see also_Darby v. Ingalls Shipbuilding, Inc.*, 99 F. 3d 685, (5th Cir. 1996).
[19] 33 USC § 902(10).
[20] 33 USC § 908.
[21] *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979).
[22] *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988).
[23] *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 172 (1984).
[24] 33 USC § 908(c)(6).
[25] *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17 (1980).
[26] 33 U.S.C. § 907(a); *Rowe v. Newport News Shipbuilding and Dry Dock Co.*, 193 F.3d 836 (4th Cir. 1999).

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.[27] Medical care must also be appropriate for the injury.[28]

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[29]

Section 7 does not require that an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.[30] Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury.[31]

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect, or refusal.[32] Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury.[33]

Section 48a Termination

Employers are prohibited from discriminating against an employee because he has claimed compensation under the Act. The employer (and not the carrier) who discriminates is liable for a penalty to the special fund of not less than $1,000 or more than $5,000.[34] Moreover, the employer who remains physically qualified for the job is entitled to reinstatement and lost pay.[35]

An employee establishes a *prima facie* case under Section 48a by showing (1) a discriminatory act (2) motivated by the employee's pursuit of his rights under the Act.[36] The motivation need not be exclusive, as long as the employee's exercise of rights under the Act played some part in the decision to treat him differently from other

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[27] *Pernell v. Capitol Hill Masonry,* 11 BRBS 532, 539 (1979).
[28] 20 C.F.R. § 702.402.
[29] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984).
[30] *Ballesteros*, 20 BRBS at 187.
[31] *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1980); *Wendler v. American National Red Cross*, 23 BRBS 408, 414 (1990).
[32] *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 103 (1997); *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).
[33] *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984).
[34] 33 U.S.C. § 948(a).
[35] *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (BRB 1988).
[36] *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759 (4th Cir. 1988).

employees.[37] If a claimant establishes a *prima facie* case, the burden shifts to the employer to prove that it was not even partially motivated by the claimant's exercise of his rights under the Act.[38]

Penalties

The Act provides an incentive for employers to give prompt notice of a possible disagreement over compensation due an employee.

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice [of controversion] is filed under subdivision (d) of this section . . . [39]

Where the employer pays some compensation voluntarily, fails to controvert the remainder, and the claimant ultimately is awarded compensation in an amount greater than that which the employer voluntarily paid, the employer's liability under Section 14(e) is based solely on the difference.[40] An informal conference can satisfy the controversion requirement in terms of terminating the penalty assessment period.[41] An employer has knowledge when it knows of the full extent of the injury.[42]

Where the employer fails to file a notice of controversion, its liability under 14(e) terminates when the Department of Labor "knew of the facts that a proper notice would have revealed."[43] Therefore, where an employer fails to file a timely notice of controversion, it has 28 days from the date of knowledge within which to pay compensation without incurring liability under 14(e).

The requirement to controvert applies even in cases where the employer pays some compensation, but disputes the amount.[44] The employer should pay the compensation it considers due and controvert the remainder.[45] If it fails to do so, and the claimant is ultimately awarded additional compensation, the penalty is based solely on

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[37] *Norfolk Shipbuilding & Drydock Corp. v. Nance*, 858 F.2d 182 (4th Cir. 1988), *cert. denied*, 492 U.S. 911 (1989); *Curling v. Newport News Shipbuilding & Dry Dock Co.* 8 BRBS 770 (BRB 1978).
[38] *Geddes v. Benefits Review Bd.*, 735 F.2d 1412 (D.C. Cir. 1984); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996).
[39] 33 U.S.C. § 914(e)(2001).
[40] *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978).
[41] *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979).
[42] *Mowl v. Ingalls Shipyard, Inc.*, 32 BRBS 51 (1998).
[43] *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979); *Hearndon v. Ingalls Shipbuilding Inc.*, 26 BRBS 17, 20 (1992) (DOL knew of facts that proper notice would have revealed when case was referred to OALJ for formal hearing).
[44] *Lorenz v. FMC Corp., Marine & Rail Equip. Div.*, 12 BRBS 592, 595 (1980).
[45] *Alston v. United Brands Co.*, 5 BRBS 600, 607 (1977).

the difference.[46] The employer must controvert the claim on specified grounds and cannot merely state that it might later controvert the claim.[47] Timely controversion shields the employer from liability under Section 14(e) even if it abandons the specific grounds listed in its controversion and adopts new ones.[48] A notice of controversion or informal conference terminates Section 14(e) penalty liability as of the date of the filing of the notice of controversion or on the date of the informal conference.[49] The penalty attaches to all payments which are "due and unpaid" at the time liability ceases.[50]

EVIDENCE

Claimant testified at trial in pertinent part that:[51]

> He was born 19 Mar 70 and is married with two children. He lives on a small ranch where he does a little horse breeding and buys and sells horses. He dropped out of school in eighth grade, but got his GED in 2000 or 2001.
>
> Claimant's work history consisted of heavy mechanical work. He did a little electrical work from time to time, worked on a lot of generator packages, and shut down systems. He knows a little about electrical systems, has had training in natural gas engines, and has experience with diesel engines.
>
> He started working for Employer in 2003. He used his hands extensively with a lot of nuts, bolts, and wrenches. A good grip is essential. He is right-handed. He worked for Employer as a field mechanic, on and offshore. Before his injury, he earned about $98,000.00 to $100,000.00 annually.
>
> Before the injury, he had a strong grip and could do fine hand manipulations. His work hours offshore fluctuated from 60 to over 100, but on average, he worked close to 85 to 95 hours per week. Before his injury, he did not spend time filling parts orders and was strictly a field mechanic. He would get paid from the time he left the shop or his house. His house was 100 miles from the shop. Unless he had to pick up a helper or parts, he never went through the shop.
>
> On 21 Jul 04, the day he was injured, he was offshore in the Gulf of Mexico at South Tim 53 for ORCA. His thumb got caught between a nylon strap and a load. He immediately iced it down, but it was a "mangled mess." All the skin was

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[46] *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979), *remanding in pert. part* 5 BRBS 290 (1977); *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978).
[47] *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 898 F.2d 1088, 1095 (5th Cir. 1990).
[48] *Pruner v. Ferma Corp.*, 11 BRBS 201, 209 (1979).
[49] *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), *aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co.*, 5 BRBS 794 (1977).
[50] *Pullin v. Ingalls Shipbuilding*, 27 BRBS 45, 46 (1993).
[51] Tr.103-161.

pulled up over the end of the thumb, but it was all still intact. He cleaned it up a little, shoved the skin back over it, and tried to take care of the pain. He immediately notified his supervisor of his injury and continued working to get the rig back up.

About one and one-half days after the accident, he went to Lakeview Hospital. He was diagnosed with a crushing injury, treated, and told not to use his right hand until he saw a hand specialist, Dr. Celentano. He saw Dr. Celentano the same day. His thumb was x-rayed. Dr. Celentano was concerned that the muscles involved might die. He placed Claimant's hand in a tight cocoon to try to force the fluids from swelling into the hand. Dr. Celentano did not allow Claimant to return to his regular duties at work. On 26 Jul 04, Claimant returned to Employer's offices. They completed and he signed an accident report.[52] That same day, Claimant returned to work doing light duties and continued on light duty until October 2004.

In October 2004, a ship owner had a job for Employer, but did not want Claimant working on it without a full medical clearance. Claimant went to Dr. Celentano, and the doctor released him for work, even though Claimant still could not grip anything. Claimant was still wearing a splint, but took it off when he was at the heliport to start the job in October. He still had pain in his thumb and tried not to use it as much as possible while on that job. That job only lasted one week and Claimant went back to wearing the splint. For the remainder of 2004, he occasionally went offshore, even with the splint. However, he always had a helper in training to assist him.

In January 2005, when Dr. Celentano wanted to do surgery on Claimant's thumb, Claimant went to get a second opinion from Dr. Faust. Claimant had the surgery in May 2005. They put two wires through his knuckle, stabilizing both bones. For awhile, the thumb felt tremendously better, but the pins poked through and had to be removed. Claimant went back to wearing a splint and his thumb was aggravated. Dr. Celentano ordered light duty with no heavy use of the right hand.

Claimant has remained on light duty the entire time, except for a period where a customer wanted him on unrestricted release.

Claimant eventually had a fusion on 12 Jan 06. At first, the pain went away, but after the pins were removed it went right back to doing the same thing. The pain and swelling increased dramatically. Claimant's thumb stayed about twice its normal size almost all the time. He could not use his thumb at all during the first five days post surgery. He eventually went back to light duty.

[52] CX-1.

Dr. Celentano recommended that Claimant have an FCE, which Claimant had on 5 Jan 06.[53] Claimant gave it his best effort. He may have tried harder than he should have, given that he bent the screw. On 8 Jan 07, Dr. Celentano cleared Claimant for unrestricted use of his hand, even though there was no chance of not favoring it.

Dr. Celentano recently told Claimant he was willing to schedule a surgery to remove the pin and re-fuse the bone. Claimant told him he needed time to prepare. Dr. Celentano told Claimant to return in two weeks. In the meantime, Claimant should use his thumb. If the screw breaks or the bone separates any further, they will have to do something immediately.

Dr. Celentano mentioned that the FCE should have showed about 25 percent disability within that thumb. Carrier sent Claimant a check the week of the hearing for a percentage of disability in his thumb.[54] It was for 6% of 75 weeks for a 6% permanent partial disability. Claimant now works for Shamrock offshore.

In 2004, Claimant made over $90,000. In 2005, it decreased to about $74,000 because Claimant could not go out in the field. In 2006, he earned $19,116.00. In 2006, Claimant worked in the shop filling parts orders, as opposed to going offshore. His decline in earnings was due to decreased overtime.

On 24 Apr 06 Claimant was in the office and overheard Jo Ann Naquin mention that he was the random pick of the month for a drug test. When he had a break, he picked up the test paper work. During lunchtime, he went and took care of the test. He then returned to work. Claimant did not think it would be a problem because usually when someone is picked for a random drug test, Employer comes to Claimant and asks if the selected worker has time to go that day. If the worker is busy, he can do it later. That was the standard. The result of Claimant's drug test was negative-dilute.

On 28 Apr 06, right before 9:00, Claimant was packaging a shipment to be sent out overnight. He was also on the phone with his brother. Keith Boudreaux approached him and indicated there was a problem with Claimant's first drug test, even though it was not positive. He told Claimant he needed to take a second drug test. Claimant had taken other drug tests in the past, but this was the first time Mr. Boudreaux actually gave him the drug test paperwork.

[53] CX-18, p.57.
[54] CX-34.

At the time, Claimant was not aware of a 30-minute rule. He signed the information sheet that everybody within the company had to sign, but did not read the part with the drug policies.[55] Mr. Boudreaux did not mention that Claimant needed to go within 30 minutes. He handed Claimant the piece of paper and looked down at his watch. Claimant told Mr. Boudreaux he had to finish the parts order before he could leave. There were mechanics waiting on parts in the field and the customer needed the parts repaired quickly. Claimant's brother told Claimant to take care of business first. When Claimant told Mr. Boudreaux about the need to fill the order, Mr. Boudreaux told Claimant to get to the drug test as soon as he could. Claimant replied that as soon as he finished, he would go directly there. Mr. Boudreaux said okay.

About 15 minutes later, Mr. Boudreaux asked Claimant if he was going. Claimant answered that he was almost done. As soon as he completed the packaging, he went for the test. He ended up giving Jo Ann Naquin the package to ship.

He left between 9:00 and 9:30. He had a horse trailer hooked up behind his truck, and was going to disconnect it, but Mr. Boudreaux suggested Claimant just take Boudreaux's Suburban instead. Claimant went directly to the testing facility at the Family Doctor Clinic and arrived no more than 10 minutes after he left the shop. He did not stop for parts on the way. He had to park in a big lot about 1 ½ blocks away from the testing office. Then he had to wade through an enormous amount of people that were outside of the building, and downstairs, to check in with the receptionist at the front desk. He went to the window and handed in his paperwork. Typically, the drug testing office sends him upstairs immediately, but they were very busy that day. The waiting room was completely packed and there were people standing all around outside. It took hours before he went upstairs to be tested.

While he waited, he got the car and moved it closer to the testing building. That was before 11:00. He eventually told the clerk that he had to urinate and did not know when he would be able to provide another sample. She handed him the cup which he filled and returned. She set it to the side, along with the beginning of his paperwork and said she would get to it after everyone else was processed. In the meantime, he went to Rally's and grabbed a hamburger for lunch. By the time he left the testing office, it was late in the afternoon.

When he returned to Employer's office, he handed Jo Ann Naquin the results of the initial test that they performed right at the facility. She walked over to the fax machine and immediately faxed it to the Production office. A few minutes later Mr. Boudreaux poked his head in the door and asked him to step outside, where a police officer was standing. Mr. Boudreaux explained that the police were there to make sure things went smoothly. He also said Claimant was fired for violating the

[55] EX-26.

company's drug policy. Claimant asked what the problem was, since his test was negative. Mr. Boudreaux said it was a violation of the 30-minute rule. That was the first time Claimant heard of a 30-minute rule and he never heard of anyone being fired for it. That was Claimant's last day of work with Employer. After the termination, Employer never suggested any jobs to him.

In August 2006, Claimant talked his doctor into releasing him to return to work because he was on the verge of losing everything he owned. He went to work for Shamrock and has been employed there ever since. He was hired without restrictions, but uses his better judgment on what he puts his hand on. He started with Shamrock offshore as a seven-and-seven field mechanic and then got pushed into a position that requires more hand use. He was not very happy about it, but it was a job and it paid the bills.

He now heads up a baseline crew, which goes out and looks at equipment. It requires Claimant to use both hands, but there are other mechanics that can do the work that is too painful for Claimant. The biggest part of his job is the paperwork. He earned $38,000.00 from August until December 2006. His release says he can work full time and use his hand, but he is reluctant to grab certain things. He still drops a lot of nuts, bolts, and tools overboard. He can grip a little, but when he grabs something too hard he still has pain. For the most part, ibuprofen helps.

Between the time he left Employer and the time he started with Shamrock, he looked for jobs at several places, including the local John Deere dealership, Reagan Equipment Company, A and E, and NAPA Auto Parts. They were concerned about Claimant's hand and did not offer him a job.

While he still worked for Employer, the company shut down for about a two-week period because of Hurricane Katrina. However, he still tried to contact customers. He does not recall if he was paid during those two weeks. He was paid hourly and was not on salary.

He has not suffered any on-the-job injuries with Shamrock, but has an appointment with Dr. Celentano on 24 Jan 07 for a follow-up. No one from Employer ever talked to him about missing equipment or tools. There have been a lot of employees within the company that have left and a lot of things have left with them. He has never taken any of Employer's equipment or tools. He loaned them a box blade, which he still has not recovered. If anything, Claimant has lost more of his personal tools while working for Employer, than Employer has ever lost from employees leaving the company.

While working for Employer, Claimant also worked around his house, grinding horse trailers and welding

His right hand is at about 50% of its pre-injury capability.

Mr. Boudreaux was very rude and smug at the end. He wanted Claimant gone. He had mentioned several times that Claimant should drop his longshore case. Employer had purchased a building and discussed making living quarters for Claimant and one other person that worked from out of town. Mr. Boudreaux said it all depended on what happened with Claimant's lawsuit against ORCA since Employer had a contractual obligation to pay ORCA.

Keith Boudreaux testified at trial in pertinent part that:[56]

He has been Employer's owner/manager for twenty-six years. Employer is a contract company for oil companies. It supplies mechanics and electricians. Claimant was originally hired by Claimant's brother, who was a manager for Employer.

At the time of his accident, Claimant was a mechanic at the office and on job locations. When he returned to work after the accident, he mostly ordered parts over the telephone.

Employer has a drug policy. It includes random checks that are done at a clinic in Houma. After his accident, Claimant worked in an office located between five and eight miles from that clinic.

On 25 Apr 06, Claimant was selected for a random drug test. Jo Ann Naquin went to lunch and was looking for Claimant's testing paperwork when he walked in with it. He had gone on his own. He was concerned that Claimant came barging into the office, grabbed something off the desk, and read it. Claimant should not have been doing that.

Although the test was not positive, it was diluted. He did not think Claimant was abusing drugs.

There are DOT and non-DOT tests. The non-DOT is for people working regular jobs. The DOT is for transportation workers and is much stricter. Claimant was supposed to have a DOT test, but he pulled a non-DOT test, which was the wrong test. Normally, they would have called the clinic to make sure it was a DOT test, but since Claimant went on his own, they had to send Claimant for a second DOT test.

It was unusual for him, as the owner, to bring the paperwork needed for the drug test down to Claimant, but he had no manager at the time. At about 8:30, he had the paperwork done and told Claimant to go back for a DOT drug screen.

[56] Tr. 28-64

Claimant explained that he needed to finish an order, but he told Claimant to leave. He told Claimant again at a quarter to 9:00 that he needed to leave. Claimant was still ordering parts, so Mr. Boudreaux left. He was suspicious because of the way Claimant was acting, so he told his safety coordinator to call the doctor. He wanted to know when Claimant left the office and when he got to the drug testing site. Claimant left Employer's office at about 9:00. The lady from the doctor's office called to say Claimant arrived at five to 11:00. Claimant left the drug testing office at 2:30. On the first drug test, Claimant had arrived at 12:00 and left at 12:11.

Mr. Boudreaux went to the clinic looking for Claimant around 10:00, but could not find him. He finally saw Claimant pull up at five to 11:00. Employer's policy manual has a time limit of 30 minutes after being notified to report for a drug screen. At 2:30, when Claimant came back, Mr. Boudreaux fired Claimant for violating company policy. There was no trace of drugs indicated on either test. He asked the deputy sheriff to be there because through the years with Claimant and his brother Employer has lost a lot of money and a lot of items have been stolen. He could have charged them with theft but did not. He wanted to make sure that when Claimant showed up and was fired, he only left with what he owned. The sheriff was there just to make sure that Claimant did not take anything with him. Even though he had some concerns about Claimant relating to the security of Employer's property, they did not play into the decision to fire him.

Claimant was chosen to get a drug test as part of Employer's random drug tests. He can pull up employees for any reason and order a drug test. He did not fire Claimant because of his workers' compensation claim against Employer. The only reason that he fired Claimant was because he missed the deadline. That gave him a reason to let Claimant go. He did not want to release Claimant because he got hurt, even though he was not happy about the third-party suits and Claimant said he was not going to sue Employer.

He could not recall whether he specifically asked the safety coordinator to pick Claimant for the first test or if it was random. He did not contend that he had reasonable cause to believe that Claimant was taking drugs. Since he is the owner, he can order any employee at any time to take a test. He cannot recall specific cases, but it is possible that he has on occasion allowed people who failed drug tests to remain employed with the company.

At the time, he did not mention the 30 minute rule to Claimant because he was not aware of it. He discovered the rule later that morning, when he called his counsel for advice on how to release somebody who was under workmen's compensation.

He was not upset that Claimant had been injured offshore. He took care of his employees like gold and they were paid excessively well for what they did. He did not recall telling Claimant he needed to drop his longshore claim. They did talk about the fact that the third-party claims coming out of his accident would make Employer's insurance responsible. He told Claimant he should go after the guy running the crane, not Employer or the oil company. Claimant's claim has increased Employer's longshore insurance rates about 30 percent.

Claimant was a very good and skilled employee.

After his accident on 21 Jul 04, Claimant did not return to his normal duties as a field mechanic. He did some mechanic work, but he was not going out to the oil company locations. He directed other employees by pointing out what to do. A field tech or mechanic makes a higher hourly wage than a person working in the shop and may get more hours.

Jo Ann Naquin testified at trial in pertinent part that:[57]

She worked for Employer from 2000 to 2005 as the office manager. The chain of authority was owner Mr. Boudreaux, the operations manager (Claimant's brother) and her.

Employer had a program on Excel that would punch up random employees for testing. The owner could also choose a specific person if there was probable cause. In April 2006, the safety manager told her to do a random selection, but that it needed to be Claimant, so she should keep running the program until it picked him. That was unusual, but she had been done it before when Employer wanted to get rid of someone and thought there was a chance they would test positive.

She had to type out the document that Claimant needed to present for the test. It was for a DOT test. She did not actually hand that document to Claimant. It was face up on her desk. He must have taken it while she was away from her desk. She did not think there was a problem with that. The office was set up so that everybody walked through right in front of her desk and could overhear her.

A few days later, Mr. Boudreaux came to the office to give Claimant another paper to get a second drug screen. It was very unusual for the owner to bring the paper for testing. She never saw it happen in the five years she worked in the

[57] Tr. 72-87.

office. Claimant was very busy ordering parts. He completed his work and immediately left for the drug test. She did not hear Mr. Boudreaux call over to the facility to see if Claimant was there. She did not hear him ask anyone else to do it either.

After lunch, Mr. Boudreaux came back with a deputy. They went into Claimant's brother's office and dismissed Claimant. Claimant gathered his things and was escorted off the property. It unusual to have a deputy present at a termination. She had never seen that before.

She was not aware of a 30-minute rule during her entire five years there, let alone hearing of someone being fired for violating it. She knows of one employee who failed a drug test who was not fired and another who took a week to take his test and was not fired.

She never heard from the safety manger or the owner that the reason for letting Claimant go was the fact that he picked up the testing paper off her desk. She had no problem with him picking it up and going for his test.

People working in the shop do not get as many hours as offshore field mechanics.

Claimant's Brother testified at trial in pertinent part that:[58]

He started working for Employer in January 2002. He is Claimant's brother and was the operations manager of Employer's mechanic division. Claimant worked for him as lead mechanic and was subject to random drug testing. At the time that he worked for Employer, Claimant's brother was never aware of any requirement that an employee report within 30 minutes of being notified for a drug test. He had been told that since they were short handed, when the randoms came down they had a month to get tested.

He was not aware of any terminations or actions taken against employees because they failed to report for a drug test within 30 minutes.

He once had an employee fail a drug test. Mr. Boudreaux called to see if there was someone who could replace that worker. Claimant's brother said no and Mr. Boudreaux said they could sweep it under the rug. The employee was not fired.

A couple weeks after Claimant was fired another employee was ordered to take a random test and it took him five days to get it done. He was not fired either.

At the time Claimant was terminated, Claimant's brother had given two weeks notice that he was leaving Employer. Claimant was going to take his place.

[58] Tr. 87-103.

He was on the phone with Claimant when Claimant was given the order to take the second test. He told Claimant that would have to wait until they were finished. They had people offshore and according to Mr. Boudreaux, that was always standard policy. They did not stop business for an employee to take a drug test. He stayed on the phone with Claimant for 20 or 30 minutes afterwards. When they got off the phone Claimant was going to pick up parts. He told Claimant to take care of his business before he went for the drug test. He did not recall whether the parts were being shipped by FedEx. They normally round up the parts and a driver takes them to the docks.

After Claimant was fired, he asked Mr. Boudreaux why. Mr. Boudreaux mentioned the 30 minute rule. He told Mr. Boudreaux that he had told Claimant to take care of the parts first, but Mr. Boudreaux said it had to be done.

Claimant's duties as a field mechanic changed once he injured his thumb. Before the injury, Claimant would normally go and do the jobs by himself. After Claimant hurt his thumb, the only jobs Claimant could go on were the big jobs where there would be four or five mechanics and helpers and Claimant could supervise. He could not do the troubleshooting or repair jobs by himself.

In the field, Claimant could make between 60 and 115 hours a week. In the office, it is strictly 40 hours, with an occasional extra hour for rounding up parts. Claimant lost a lot of pay. If Claimant's earnings went from $98,000.00 in 2004, to $77,000.00 in 2005, the overtime factor could absolutely account for that decrease.

Department of Labor forms show in pertinent part that:[59]

Claimant was injured on 21 Jul 04 and did not miss any work beyond that shift. On 27 Jul 04, Employer reported the injury. On 8 Jun 06, the parties participated in an informal conference at which Employer disputed nature and extent of the injury and the allegation of a Section 48 termination.

Claimant's pay records show in pertinent part that:[60]

While working for Employer, Claimant earned $46,954.50 the first six months of 2004 and $6,900.00 in the third quarter period before his injury, for a total 2004 pre-injury earnings of $53,854.50. He earned a total of $96,285.00 for all of 2004, leaving $42,430.50 as his post injury earnings in 2004. Claimant earned $77,430.00 in 2005 and $19,116.00 through his termination from Employer in April 2006.

[59] CX-4 - 6; EX-1.
[60] CX-7, 9-12, 16; EX-21-23.

Claimant earned $28,500.00 from Shamrock Oil from August through December 2006.

Employer's drug program records show in pertinent part that:[61]

Claimant was tested on 24 and 28 Apr 06. Both tests were random, DOT Panel, and negative-dilute. In 2003, Claimant signed a statement that he had read and understood Employer's safety handbook, which required employees to report for a drug test within 30 minutes of notification.

Family Doctor Clinic Laboratory's records show in pertinent part that:[62]

On 28 Apr 06, at 11:00, pursuant to a random test ordered by Employer, Claimant provided a urine specimen for a random test.

A state job program website printout shows in pertinent part that:[63]

On 28 Apr 06, at 2:43 p.m. Mr. Boudreaux reported he had fired Claimant for violating company policy.

An unsigned, untitled document states in pertinent part that:[64]

On 28 Apr 06, Mr. Boudreaux spoke with Claimant about a drug test and Claimant left the office at 9:00 a.m.. Ellen called the clinic and they said they would note the time when Claimant arrived. At 9:30, Ellen called the clinic and they said Claimant had not arrived. At 10:10, Mr. Boudreaux went to the clinic and did not see Claimant.

At 10:30, Mr. Boudreaux called Employer's counsel and discussed the situation. They noted that the manual required employees to arrive within 30 minutes of testing notice. The clinic reported that at 10:55, Claimant arrived hoping up and down and saying he needed to urinate. Claimant left the clinic at 12:25 and arrived at Employer's facility and 1:55. Claimant was escorted off the premises at 2:58. Employer clarified with Carrier that it no longer had to pay Claimant disability benefits.

[61] CX-13; EX-25.
[62] CX-14.
[63] CX-15.
[64] EX-27.

Dr. Richard Celentano's medical records state in pertinent part that:[65]

> He has been Claimant's treating physician for his thumb injury since 23 Jul 04.
>
> On 1 Sep 06, he opined that Claimant had reached MMI on 8 Aug 06, with an 8% impairment to the thumb.
>
> On 22 Nov 06, he prescribed a functional capacity evaluation for Claimant.
>
> On 8 Dec 06, he reported Claimant had a 6% permanent impairment to his thumb. Although Claimant was largely asymptomatic with excellent position, he was concerned that it was quite possible that Claimant could suffer a future breakdown of his fusion and require further surgery.

ANALYSIS

NATURE AND EXTENT OF DISABILITY

In spite of the temporary period during which Dr. Celentano acceded to Claimant's request and provided a full clearance and the subsequent short assignment that Claimant accepted, the weight of the evidence is clear that Claimant has never been able to return to his full pre-accident duties. Claimant's testimony along with his brother's and even that of Mr. Boudreaux, corroborate a finding that Claimant became presumptively totally disabled as of 21 Jul 04. The fact that he continued working for Employer beyond that date until 28 Apr 06 establishes suitable alternative employment (SAE) for that time. The issues remaining, therefore, are the determination of Claimant's post injury earning capacity and whether, at any point, he reached maximum medical improvement and became entitled only to a scheduled award.

1 Jan 05 through 28 Apr 06

Although Claimant became partially disabled on 21 Jul 04, Claimant only seeks compensation starting on 1 Jan 05. The dispute between the parties relates to the manner of calculating Claimant's post injury earning capacity. Claimant argues that the correct post injury earning capacity is $1,399.21, the aggregate amount earned from 1 Jan 05 to 28 Apr 06 ($96,546.00) divided by the weeks worked (69).

Employer counters that Claimant's election not to claim the period between his injury and 1 Jan 05 should not change the calculation of his true post injury earning capacity. Employer assumes that since Claimant did not include the period before 1 Jan 05 in his claim, he must have been making at a minimum, his AWW of $1,901.78.

[65] EX-4-10, 15-19; CX-18 (*as cited*, *see* fn.4).

Employer therefore attributes to Claimant's post injury earning capacity his 2004 earnings of $44,284.31 by multiplying Claimant's AWW ($1,901.78) by the number of post injury weeks (27 2/3). Employer then adds that to the calculations of Claimant, arriving at a total post injury income from Employer of $140,830.31 spread over 92 2/7 weeks and a proposed weekly post injury capacity of $1,520.92.

The problem with Employer's approach is that Claimant's post injury earning capacity from 21 Jul 04 to 1 Jan 05 may not have been the same as his AWW. Post injury earning capacity is not necessarily static over time. In any event, Claimant is only seeking compensation from 1 Jan 05 until 28 Apr 06. Thus, it is his post injury earning capacity for that period that is relevant. Accordingly, I find that his weekly post injury earning capacity for the claimed period of 1 Jan 05 to 28 Apr 06 was $1,399.21.

28 Apr 06 through 16 Aug 06

Claimant argues that since Employer wrongfully terminated him on 28 Apr 06, he lost SAE as of that date and reverted to total disability until he obtained employment on 16 Aug 06. Employer responds that as the termination was proper and unrelated to any disability it remained liable only for Claimant's continued partial disability.

The threshold question for this issue, and the related allegation by Claimant that Employer violated Section 48(a), is whether Claimant was fired for appropriate disciplinary reasons or because of his claim. Setting aside the factual issue of whether Claimant went directly to the testing facility, the record clearly establishes that Employer's owner disingenuous assertion that he fired Claimant for violating a "30 minute rule" that he stumbled upon while searching for ways to discharge a compensation recipient is at best a flimsy pretext.

The most credible witness on this issue was Jo Ann Naquin, who was Employer's office manager for five years. She testified that she: (1) was not aware of a 30-minute rule in the drug policy and never heard of an employee being fired for violating it; (2) was aware of one employee who failed a drug test and was not fired and another who took a week to take his test and was not fired; (3) had been told in the past to keep running a random program until it selected a specific employee targeted for discharge; (4) was told to keep running the random program until it picked Claimant; (5) until the incident with Claimant, had never seen Mr. Boudreaux come to the office to give an employee paperwork to go do a drug screen; (6) said Claimant was busy ordering parts when asked to go to the testing clinic and left as soon as he was done; and (7) had no problem with Claimant having previously taking the testing paperwork from her desk.

Even Mr. Boudreaux conceded that he did not think Claimant was abusing drugs and that although he had some concerns about property security relating to Claimant, those concerns did not play into the decision to fire him. He admitted that at the time that he was not aware of the 30 minute rule and only discovered it when he called his counsel

for advice on how to release somebody who was under workmen's compensation. His testimony that the only reason he fired Claimant was because he missed the 30 minute deadline is contradicted by the weight of the credible evidence in the case. He noted that Employer paid injured workers excessively well and he was not happy about the third-party suit.

In light of Claimant's and his brother's testimony, which corroborates the testimony of Jo Ann Naquin, the circumstantial evidence is clear that the decision to fire Claimant was primarily, if not totally, a function of his status as a claimant. Consequently, Employer has not established SAE as of 28 Apr 06 and Claimant reverted back to total disability from that date until he started working for Shamrock on 16 Aug 06.[66]

MAXIMUM MEDICAL IMPROVEMENT

Given the nature of Claimant's injury and his treating physician's assessment, Claimant's compensation entitlement was limited to the schedule once he reached permanent partial status. Dr. Celentano's December 2006 office note indicates a possibility that Claimant's fusion would breakdown and lead to more surgery. However, he noted that solely for the purpose of accounting for the possibility of future medical expenses. He did not recant his August 2006 finding of MMI. In fact, at the time of the December letter, in the absence of a possible, but indeterminate future event, Claimant did not require more significant medical treatment.

Consequently, I find that Claimant reached MMI on 8 Aug 06. Accordingly, the first point at which Claimant was permanently partially disabled, and his entitlement to benefits changed to a scheduled award, was on 16 Aug 06.

SECTION 48A

The circumstances and factual findings surrounding Claimant's termination on 28 Apr 06 have been discussed in terms of the nature and extent of Claimant's disability as of that date. The weight of the evidence in the record clearly demonstrates Employer's animus against Claimant based on his status as a claimant. Employer's argument that Claimant was not physically qualified to return to work for Employer is unsupported by the record. While Claimant was not able to return to his original job, he could have returned to the SAE from which he was wrongfully discharged.

[66] Employer did not offer evidence or argue that any other SAE existed during that period. CX-29 lists some jobs, but there is insufficient discussion to establish them as SAE. In any event, Claimant testified he applied at some locations but was unable to obtain a job.

Claimant does not specifically seek reinstatement, but rather requests "applicable penalties" under Section 48a.[67] Claimant's entitlement to back pay would cease as of the date he obtained other employment. Consequently, Claimant would be entitled to weekly back pay of $1,124.47 beginning from his discharge on 28 Apr 06 until 16 Aug 06.[68] However, that is less than the temporary total disability Claimant is otherwise entitled to for the same period. Thus, the Court does not order back pay.

However, given the clear animus demonstrated by Employer, who was looking for a way (and seeking counsel's advice on how) to terminate a compensation recipient, I find that an additional fine payable to the special fund in the amount of $4,000.00 is appropriate.

THE FCE

On 22 Nov 06, Claimant's treating physician prescribed an FCE for Claimant. Employer does not dispute, and the record corroborates, that Claimant requested the care and was refused or that the care cost $2,500.00. Employer instead argues that that FCE was unreasonable based on the physician's letter less than one month later (and before the FCE) reporting Claimant's condition and assessing a percentage of permanent impairment, particularly in light of the fact that Claimant had been employed since August.

Employer's argument is a rational position, but is insufficient to overcome the *prima facie* case met by the Claimant. Although his reasons were not clearly articulated in the record, the physician who had treated Claimant's injury for years found that an FCE would assist in Claimant's treatment (which includes setting medical restrictions). Given the relatively small cost of the FCE, I am not inclined to overturn the physician's recommendation. I find the FCE was reasonable, appropriate, and necessary.

PENALTIES

Although Claimant suggests and the parties stipulated that Employer controverted the claim on 19 Jun 06, an informal conference held on 8 Jun 96 sufficed to satisfy that requirement. Employer argues that since Claimant had a scheduled injury, returned with no loss of work time, and Employer was in good faith waiting to determine the extent of injury, it did not have the requisite knowledge that required it to controvert the claim until the partial disability reached permanency. Employer reasons that since Claimant reached MMI well after the controversion, it was timely and no penalties are due.

[67] In the context of Claimant's brief, it is unclear whether he simply seeks penalties to the special fund or back pay. In as much as back pay is a penalty under Section 48a, I have considered it.

[68] Claimant's year to date wages from Employer as of his discharge on 28 Apr 06 were $19,116.00. Rounding up to 17 weeks results in a weekly wage of $1,124.47.

Employer's argument is based upon the predicate that Claimant returned to work with no time loss. That predicate, along with the contention that Employer was waiting in good faith to determine the extent of injury, ceased on the date Employer terminated Claimant. Thus, Employer had knowledge requiring controversion on 28 Apr 06, but failed to do so until 8 Jun 06. Therefore, it is liable for penalties on the amounts due for the related period therein.

ORDER AND DECISION

1. From 1 Jan 05 to 28 Apr 06, Claimant was temporarily partially disabled. Employer shall pay Claimant compensation for that period based on an AWW of $1,901.78 and post injury weekly earning capacity of $1399.21.

2. From 29 Apr 06 to 08 Aug 06, Claimant was temporarily totally disabled and Employer shall pay Claimant compensation for that period based on an AWW of $1,901.78.

3. Claimant's FCE was reasonable, appropriate and necessary. Employer shall reimburse Claimant for the costs related to the FCE.

4. Claimant's work related injury reached MMI on 08 Aug 06.

5. From 09 Aug 06 through 15 Aug 06, Claimant was permanently totally disabled and Employer shall pay Claimant compensation for that period based on an AWW of $1,901.78.

6. As of 16 Aug 06, Claimant was permanently partially disabled with a 6% impairment to his thumb. Employer shall pay Claimant as of that date a corresponding percentage of 2/3 of Claimant's AWW for 75 weeks.

7. Employer discharged Claimant on 28 Apr 06 because of his status as a claimant, in violation of Section 48a of the Act. Employer[69] shall pay to the Special Fund a fine in the amount of $4,000.00

8. Employer shall pay all future reasonable, appropriate, and necessary medical expenses arising from Claimant's work injury, pursuant to the provisions of Section 7 of the Act.

9. Employer was on notice of Claimant's injury and should have filed a notice of controversion by 28 Apr 06. It controverted on 8 Jun 06 and shall pay penalties on amounts due until that time in accordance with Section 14(e).

[69] Not Carrier

10. Employer shall receive credit for all compensation heretofore paid, as and when paid.

11. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[70]

12. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

13. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[71] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

[70] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al*., 16 BRBS 267 (1984).

[71] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **29 Jun 06**, the date this matter was referred from the District Director.